

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JESSICA L. DEZIEL,

Plaintiff,

v.

MAINE MUTUAL FIRE INSURANCE
COMPANY,

Defendant.

Docket No. 2:98-CV-381

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

The Plaintiff in this case is Jessica L. Deziel, represented by David Polow. The Defendant in this case is Maine Mutual Fire Insurance Company and is represented by Keith Aten.

The only issue in this case is the amount of damages that Ms. Deziel sustained as a result of a car accident she was involved in. The facts surrounding the accident itself are undisputed. Both parties agree that Ms. Deziel was involved in a car accident on July 4, 1996, in which her car collided with

that of another driver, Jessica Merchant, who is not a party to this case. Both parties have agreed that the accident was the result of Ms. Merchant's negligence. Finally, both parties concede that Maine Mutual Fire Insurance Company issued an insurance policy which covered the damages that Ms. Deziel sustained in the accident. Therefore, you do not have to address the issue of liability. You also should not consider whether anyone else is responsible for the damages. Your sole responsibility is to determine the amount of damages to which Ms. Deziel is entitled as a result of the accident with Ms. Merchant. To make this determination, you must consider all of the evidence in light of the explanations of the law that I am about to provide in these instructions.

Role of the Court, the Jury and Counsel

Now that you have listened carefully to the testimony that has been presented to you, you must consider and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You weigh the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. Shortly, I will define "evidence" for you and tell you how to weigh it, including how to evaluate the credibility or, to put it another way, the believability of

the witnesses.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions should be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should evaluate the evidence deliberately and without the slightest trace of sympathy, bias or prejudice for or against any party. All parties expect that you will carefully consider all of evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Corporations and Corporate Liability

A corporation is entitled to the same fair trial as a private individual. All persons, including corporations and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice. Of course, when a corporation is involved in a case, it may act only through natural persons as its agents or employees.

Evidence in the Case

As I have said earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation and regard that fact as proved.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. But it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

The evidence includes any stipulated facts, the sworn testimony of the witnesses, and the exhibits admitted in the

record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be entirely disregarded.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Direct and Circumstantial Evidence

The law recognizes two types of evidence: direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience, one may reasonably infer the ultimate fact sought to be established.

Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Witness Credibility

You, as jurors, are the sole judges of the credibility of the witnesses and the importance of their testimony. It is your job to decide how believable each witness was in his or her testimony. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which may help you decide the truth and the importance of each witness's testimony. Consider each witness's knowledge, motive and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; any interest he or she may have in the outcome of the case, or any bias for or against any party; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or

may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and people naturally tend to forget some things or remember other things inaccurately. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you should give the testimony of each witness such weight, if any, as you may think it deserves. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

Expert Witnesses

You have heard the testimony of expert witnesses in this case. An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in a field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing an expert's testimony, you may consider his or her qualifications, opinions, and reasons for testifying, as well as all of the other considerations that apply when you are deciding whether to believe a witness's testimony. You may give the expert's testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should consider the soundness of his or her opinion, reasons for the opinion and motive, if any, for testifying. You should not, however, accept the expert's testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case, as I have said, rests solely with you.

Burden of Proof

Because this is a civil case, the plaintiff, Ms. Deziel, has the burden of proving the amount of damages she sustained

by a "preponderance of the evidence." To prove something by a preponderance of the evidence means to prove that something is more likely true than not true. A preponderance of the evidence means the greater weight, or logic, or persuasive force of the evidence. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If, after considering all of the evidence, you conclude that Ms. Deziel failed to establish any essential element of her claim by a preponderance of the evidence, you should find for Maine Mutual Fire Insurance Company as to that claim. If, after such consideration you find the evidence of both parties to be in balance or equally probable, then Ms. Deziel has failed to sustain her burden and you must find for Maine Mutual.

Damages

As you know, your sole responsibility in this case is to determine the amount of damages that Ms. Deziel sustained as a result of the July 4, 1996, accident. Here, the word "damages" is a legal term referring to the amount of monetary payment to

which Ms. Deziel is entitled to compensate her for her losses, if any, which resulted from the accident. These are called "compensatory damages." Compensatory damages seek to make the plaintiff whole -- that is, to compensate her for any damage that she may have suffered. Furthermore, compensatory damages are not limited to monetary expenses that Ms. Deziel may have borne, but can also include compensation for intangible damages such as physical pain and suffering, emotional and mental distress, and loss of enjoyment of life.

Ms. Deziel seeks to be compensated for medical, chiropractic, and massage therapy bills, medications, and other expenses made necessary by the injury. You may award Ms. Deziel damages for such expenses for any amounts which you find were reasonably necessary for the treatment of injuries Ms. Deziel suffered as a result of the accident. Note that it is not necessary that Ms. Deziel show she has paid such expenses, but only that she incurred them and became obligated to pay them. You may also award a sum of damages as compensation for future medical expenses to the extent that you find that such expenses are reasonably certain to arise during the period of one year from today's date.

Ms. Deziel also seeks to be compensated for pain and suffering, emotional and mental distress, and loss of enjoyment of life. You may consider Ms. Deziel's past pain and suffering,

emotional and mental distress, and loss of enjoyment of life in determining the amount of compensatory damages to award her. You may also consider such damages that Ms. Deziel may experience in the future, to the extent that you find such damages are reasonably certain to arise during the period of one year from today's date as a result of the accident. No evidence of monetary value of such intangible damages as pain and suffering, emotional and mental distress, or loss of enjoyment of life has been, nor need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Therefore, any award you make for such intangible damages should be fair in light of the evidence presented at trial.

I remind you that you may award compensatory damages only for injuries that Ms. Deziel has proven, by a preponderance of the evidence, were proximately caused by the accident. The damages you award must be fair and reasonable, neither inadequate nor excessive. You should not award damages for speculative injuries, but only for those injuries that Ms. Deziel has actually suffered or which she is reasonably likely to suffer in the future.

In awarding compensatory damages, should you decide to award them, you must be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that

difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require Ms. Deziel to prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

In determining the damages involved in this case, you should in no way consider the possibility that any of Ms. Deziel's losses might have been or might someday be paid by Ms. Merchant, the driver of the car that hit Ms. Deziel's. It is not relevant to the case before you whether Ms. Deziel's medical bills have been paid or by whom. You may not consider whether any damages you award will go to the plaintiff or to reimburse others. As has been repeatedly emphasized, your sole focus as judges of the facts in this case should be on determining the amount of damages that Ms. Deziel sustained as a result of the July 4, 1996, accident.

Finally, you should know that this is the only opportunity Ms. Deziel will have to recover from Maine Mutual Fire Insurance Company for injuries resulting from the July 4, 1996, crash, if you find such recovery is warranted.

Mitigation of Damages

Any person who claims damages as the result of an alleged wrongful act of another has a duty under the law to use reasonable diligence under the circumstances to "mitigate," or

minimize, those damages. The law imposes on an injured person the duty to take advantage of reasonable opportunities he or she may have to prevent the aggravation of his injuries, so as to reduce or minimize the loss or damage.

If you find that Ms. Deziel has suffered damages, she may not recover for any item of damage she could have avoided through such reasonable effort. If Ms. Deziel unreasonably failed to take advantage of an opportunity to lessen her damages, you should deny recovery for those damages which she would have avoided had she taken advantage of the opportunity.

Bear in mind that the issue as to whether Ms. Deziel acted "reasonably" with respect to the mitigation of damages is one for you to decide, as the sole judges of the facts. Although the law will not allow an injured plaintiff to sit idly by when presented with an opportunity to mitigate damages, this does not mean that the law requires an injured plaintiff to exert himself unreasonably or incur unreasonable expense in an effort to mitigate. Furthermore, it is Maine Mutual's burden to prove that the damages reasonably could have been avoided. In deciding whether to reduce Ms. Deziel's damages due to some failure on her part to mitigate, therefore, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether Maine Mutual has satisfied its burden of proving that Ms. Deziel's conduct

was unreasonable.

Verdict Based Upon Evidence

Your verdict in this case must be based solely upon the evidence presented at the trial of this case, whether testimonial or documentary, and legitimate inferences to be drawn therefrom. Your verdict may not be based upon sympathy for a party, prejudice, passion, speculation or conjecture.

Unanimous Verdict

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. That is, your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with other jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and to change your opinion if you become convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- the judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Closing Instructions

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A copy of this charge will go with you into the jury room for your use.

Communications with the Court

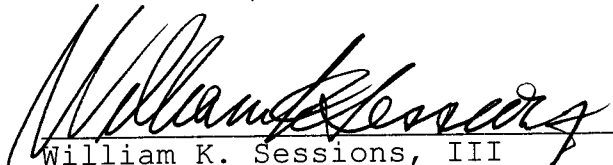
If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer, signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any

person -- not even to the Court -- how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

Dated at Burlington, Vermont this 9 day of December, 2000.


William K. Sessions, III
United States District Court